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No. 843

In the Supreme Court of the United States

OCTOBER TERM, 1957

JOSEPH AGUILAR GAITAN, DOLORES MARY GAITAN, AND ANISETO SILVA, PETITIONERS

v.

UNITED STATES OF AMERICA

On Petition for Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (Pet. App. A) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered January 23, 1958. A petition for rehearing was denied February 8, 1958. The petition for a writ of certiorari was filed on March 8, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether there was federal participation in a search by state officers.

2. Whether evidence secured by state officers without federal participation was subject to the federal rule of exclusion.

3. Whether the court erred in denying a mistrial on the ground that exhibits, which were not identified or shown to the jury and which the judge subsequently ordered excluded, were marked for identification by the court reporter in the presence of the jury.

STATEMENT

In the United States District Court for Colorado, petitioners were convicted of conspiracy to violate the laws relating to marihuana. In addition, the Gaitans were jointly charged and convicted of receiving and possessing marihuana without having paid the required transfer tax and with concealment of the marihuana. Petitioner Silva, together with one Emmett, was convicted of transporting and concealing marihuana on which the required tax had not been paid and with unlawfully transferring the marihuana to the Gaitans (R. 2-5, 12-13). Joseph Gaitan was sentenced to imprisonment for ten years and the other petitioners to imprisonment for five years (R. 16-18).

Before trial, petitioners moved to suppress as evidence the marihuana taken from the apartment of the Gaitans on February 5, 1957. The motion was supported by affidavits of the Gaitans to the effect that their apartment had been illegally entered and

searched, but with no affidavit by Silva and no claim by him of ownership or possession of either the premises or the property (R. 6-8).

The circumstances of the search, as developed at the hearing on the motion to suppress and at the trial, may be summarized as follows:

The Gaitans were caretakers of premises at 1831 Williams Street in Denver and occupied the basement apartment (R. 56). State police began surveillance of the premises about 4:00 p. m. on February 5, 1957 (R. 71). At about 5:30 p.m., Joseph Gaitan and Emmett drove off, returning about 5:45. At about 6:00 p.m., a car with four young men drove up. One man knocked on the basement window and he and another went in by the side door. About ten minutes later, the two men emerged, and all four drove away (R. 72-74).

At about 6:15 p.m., Joseph Gaitan, Silva, and Emmett drove off, and returned about twenty minutes later. As they entered the house, Gaitan was observed carrying a box with groceries and Silva a fairly large shopping sack (R. 74-75). At about 7:30, two persons, one known to the surveilling officer, entered the premises and left about fifteen minutes later, one carrying a small sack (R. 75). Thereafter, three officers were sent to the rear of the premises (R. 76). At about 8:00 p.m., Emmett and Silva started to leave by the side door and were arrested on the landing. A tin can containing a substance believed to be marihuana was found on Emmett's person (R. 78). Thereafter, when one Wayne Blendley knocked on the outside door, Joseph Gaitan came up from his basement apartment to let him in (R.

39, 79). At that point, as Gaitan turned to go down, the officers displayed their guns, placed Gaitan and Blendley under arrest, and told them to go down to the apartment (R. 39, 79). The officers searched the apartment (R. 79). After asking Mrs. Gaitan to remove a crib in front of a trap door, one of the officers opened the door and found a sack containing a substance subsequently proved to be marihuana (R. 87-88). At the hearing on the motion to suppress, the Gaitans testified that the space back of the door was used for the house meters, that no one entered it except the meter man (R. 44, 45, 56).

After the marihuana was found at about 9:30 p.m., one of the state officers called federal narcotics agent Gress (R. 32, 46, 49). Gress came to the apartment entering through the open door. He looked at the package of marihuana in the hands of the state police (R. 32, 34, 40, 50-51). One of the policemen pointed out to Gress the door behind which the marihuana had been found (R. 34). When the police took Gaitan to police headquarters, Gress went along for "no particular reason unless it was one of custody, and assisting Captain Nelson to take him to the Police Department" (R. 36). There had been no communication between state and federal authorities before the call to Gress (R. 49, 52). The arrested defendants were held in state custody overnight (R. 52) and the marihuana was retained by state officials until late the next day when the federal authorities adopted the case (R. 51-52).

The District Court held that there was no basis for sustaining the motion to supress as to Silva (R. 59, 68). As to the Gaitans, the court denied the motion

on the ground that no federal participation had been shown (R. 64-68). The Court of Appeals affirmed.

ARGUMENT

1. There is no merit in petitioner's attack upon the finding of the two courts below (Pet. 7-8) that there was no showing of federal participation which would render the search a federal undertaking. The evidence establishes that the surveillance was undertaken by state officers without consultation or communication with the federal authorities. The federal authorities were not notified until the participants had been arrested and the search completed. The defendants and the marihuana were held in state custody at least a day after the arrest until the federal authorities decided to adopt the case. The mere fact that, after the search had been completed, the state authorities notified a federal agent and he came down to the apartment and looked at the marihuana does not serve to bring this case within the holding of *Lustig* v. *United States*, 338 U.S. 74. In the *Lustig* case, federal participation was found by reason of the fact that the federal officer initiated the investigation by state authorities, and the federal officer, who came onto the premises before the search was concluded, shared "in the critical examination of the uncovered articles as the physical search proceeded" and "had a vital share in sifting the evidence." (338 U.S. at pp. 78-79). Here, on the other hand, the search "had run its course" and "the object of the search was completely accomplished" (*id.*) before the federal authorities were even called. The case is, as the District Court

noted, very close to *Symons* v. *United States*, 178 F. 2d 615, 618 (C.A. 9), certiorari denied, 339 U.S. 985, where no federal participation was found even though the federal officer, notified after the search was completed, came down and thereafter took charge of further proceedings. See also *Shurman* v. *United States*, 219 F. 2d 282, 286-288 (C.A. 5), certiorari denied, 349 U.S. 921.[1]

2. Relying on the statement in a footnote in this Court's decision in *Benanti* v. *United States*, 355 U.S. 96, 102, fn. 10, that it "has remained an open question in this Court whether evidence obtained solely by state agents in an illegal search may be admissible in federal court, despite the Fourth Amendment", petitioner asks for reexamination of the so-called "silver platter" doctrine. The federal courts have been operating under the doctrine since the rule of suppression was first enunciated in *Weeks* v. *United States*, 232 U.S. 383. The *Weeks* decision itself had held that evidence secured by state officers not acting under any claim of federal authority was admissible in a federal court. 232 U. S. at p. 398. In *Byars* v. *United States*, 273 U.S. 28, 33, the Court said that it did "not question the right of the federal government to avail itself of evidence improperly seized by state officers operating entirely upon their own account." And in *Lustig* v. *United States*, 338 U.S. 74, the four dissenting justices, together with Justice Frankfurter, indicated their adherence to the position that a search

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[1] The petition for a writ of certiorari in the *Shurman* case did not raise this issue (No. 671, O.T., 1954).

"is not a search by a federal official if evidence secured by state authorities is turned over to the federal authorities on a silver platter." 338 U.S. at pp. 78-79. Since *Lustig*, as well as before, the "silver platter" doctrine has been accepted as controlling in numerous decisions of the Courts of Appeals. *Losieau* v. *United States*, 177 F. 2d 919, 923 (C.A. 8); *Parker* v. *United States*, 183 F. 2d 268, 270 (C.A. 9); *Fredericks* v. *United States*, 208 F. 2d 712, 714 (C.A. 5), certiorari denied, 347 U.S. 1019; *United States* v. *Stirsman*, 212 F. 2d 900, 905 (C.A. 7); *Jones* v. *United States*, 217 F. 2d 381 (C.A. 8); *United States* v. *White*, 228 F. 2d 832, 835 (C.A. 7); *Collins* v. *United States*, 230 F. 2d 424, 425 (C.A. 6).

We suggest that there is no occasion at this time to reexamine this long-enunciated doctrine. This Court held in *Wolf* v. *Colorado*, 338 U.S. 25, and *Irvine* v. *California*, 347 U.S. 128, that the Fourth Amendment does not require that state courts adopt the federal rule of exclusion. Whether or not state officers should be subject to the deterrent effect of the exclusionary rule has, under our federal system, been left for state determination. A rule which would exclude from federal courts evidence obtained by state officers acting entirely under state authority would therefore not deter state officers. It would exclude relevant evidence from federal courts for actions over which federal authorities have no control, without necessarily vindicating the rights of the individual involved. Thus, such a rule would serve neither of the purposes which the exclusionary rule was designed to meet. It would neither serve to protect the indi-

vidual nor act as a deterrent against improper official action.[2]

3. The government called as a witness a member of the Denver police in charge of identification and asked whether he had produced "certain records" (R. 80). They were handed to government counsel who asked the reporter to mark them for identification (R. 80). At that point, defense attorneys approached the bench and asked for a mistrial. In chambers, defense counsel argued that the exhibits were police records accompanied by arrest records, pictures and statements; that they were marked in close proximity to the jury; and that "we cannot presume on anything that somebody on that Jury does not know what these items are" (R. 81). The District Court ruled that the exhibits were not proper evidence and directed that they not be returned to the court room (R. 81-84). However, the court denied the motion for a mistrial, noting that the records were not identified as anything other than records of the police department and that nothing was exhibited to the

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[2] It should be noted that petitioner Silva has no standing to complain of the search, or to have the evidence suppressed, since he claimed no interest in either the premises or the property. *Goldstein* v. *United States*, 316 U.S. 114, 121; *Shurman* v. *United States*, 219 F. 2d 282, 288 (C.A. 5), certiorari denied, 349 U.S. 921; *Lagow* v. *United States*, 159 F. 2d 245, 246 (C.A. 2), certiorari denied, 331 U.S. 858. Since the contraband marihuana was not property which would have been returned, it was properly admissible against Silva on the second count which did not involve the Gaitans (R. 4), regardless of any ruling on the motion to suppress as to the Gaitans. The sentence of five years received by Silva was imposed on each of counts 1-3, to run concurrently (R. 18).

jury. He stated "my own notion is that the Jury never saw these or never were able to see them close enough to identify what they were" (R. 83). This ruling, within the area of the discretion of the trial judge, was fully justified. The mere marking of four exhibits, each in four parts, could hardly have been meaningful to the jury.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writs of certiorari should be denied.

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